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6      Attorney for Material Witnesses:

7      MING ZHOU ZHU  
8      LIANGNENG JIANG  
9      YUHAI WANG  
10     XUZAI DONG  
11     LIQIU LIN

10     UNITED STATES DISTRICT COURT  
11     SOUTHERN DISTRICT OF CALIFORNIA  
12     (Honorable RUBEN B. BROOKS)

13     UNITED STATES OF AMERICA, ) CRIMINAL CASE 08CR0396-JLS  
14     Plaintiff, ) MAGISTRATE CASE 08MJ8096-PCL  
15     v. ) DATE: March 13, 2008  
16     CHEONG SAU WONG, ) TIME: 9:00 A.M.  
17     XU JUN LEE )  
18     ) MEMORANDUM OF POINTS AND  
19     ) AUTHORITIES IN SUPPORT  
20     ) OF MOTION FOR ORDER  
21     ) SETTING VIDEO DEPOSITION  
22     ) OF MATERIAL WITNESSES  
23     ) MING ZHOU ZHU  
24     ) LIANGNENG JIANG  
25     ) YUHAI WANG  
26     ) XUZAI DONG  
27     ) LIQIU LIN  
28     Defendants. )  
29     )  
30     )

31     I.

32     INTRODUCTION

33     The material witnesses, MING ZHOU ZHU, LIANGNENG JIANG, YUHAI  
34     WANG, XUZAI DONG and LIQIU LIN, were arrested on or about January  
35     29, 2008, and have remained in custody since that date.

36     Witnesses, MING ZHOU ZHU, LIANGNENG JIANG, YUHAI WANG, XUZAI  
37     DONG and LIQIU LIN, seek an Order by this Court under 18 U.S.C.

1      Section 3144 and Federal Rule of Criminal Procedure 15 to have  
2      their testimony preserved in a video deposition as they have been  
3      unable to secure a surety under the conditions imposed by the  
4      government in this matter.

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6                    II.

7

                  UNDER EXISTING FEDERAL LAW

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                  THE COURT IS REQUIRED TO ORDER

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                  THE DEPOSITION AND RELEASE OF THESE WITNESSES

10     18 U.S.C. Section 3144 provides that material witnesses who  
11    are unable to comply with any condition of release have the right  
12    to have their deposition taken and thereafter be released:

13     "No material witness may be detained because of inability to  
14    comply with an condition of release if the testimony of such  
15    witness can adequately be secured by deposition, and if further  
16    detention is not necessary to prevent a failure of justice..."

17     "Upon such a showing, the district *must* order [the witness']  
18    deposition and prompt release." (*Torres-Ruiz v. United States*  
19    District Court for the Southern District Court of California, 120  
20    F.3d 933, 935 (9<sup>th</sup> Cir., 1997)) (emphasis in original).

21     Further, Federal Rule of Criminal Procedure 15 (a) provides  
22    the procedure basis for this motion for deposition:

23     "If a witness is detained pursuant to Section 3144 of Title  
24    18, United States Code, the Court on written motion of the witness  
25    and upon notice to the parties may direct that the witness's  
26    deposition be taken. After the deposition has been subscribed the  
27    Court may discharge the witness..."

28

1       Under such circumstances, "if the deposition would prove  
2 admissible over any objection under the Confrontation Clause of the  
3 United States Constitution or the Federal Rules of Evidence, the  
4 material [witness] must be deposed rather than detained." (*Aguilar-*  
5 *Ayala v. Ruiz*, 973 F.2d 411, 413 (5<sup>th</sup> Cir. 1992)).

6       The language of 18 U.S.C. Section 3144 is mandatory and  
7 requires material witnesses's deposition and release.

8       Further, legislative history supports the position that the  
9 deposition and release of a material witness is mandatory.

10      Section 3144: RELEASE OR DETENTION OF A MATERIAL WITNESS,  
11 reads (in part):

12      This Section carries forward, with two significant changes,  
13 current 18 U.S.C. 3149 which concerns the release of a material  
14 witness. If a person's testimony is that it may become  
15 impracticable to secure his presence by subpoena, the government is  
16 authorized to take such person into custody. A judicial officer is  
17 to treat such a person in accordance with Section 3142 and to  
18 impose those conditions of release that he finds to be reasonably  
19 necessary to assure the presence of the witness as required, or if  
20 no conditions of release will assure the appearance of the witness,  
21 order his detention as provided in Section 3142. However, if a  
22 material witness cannot comply with release conditions or there are  
23 no release conditions that will assure his appearance, but he will  
24 give a deposition that will adequately preserve his testimony, the  
25 judicial officer is required to order the witness's release after  
26 the taking of the deposition if this will not result in a failure  
27 of justice... 1984 U.S. Code Cong. and Adm. News, p. 3182.

1        In the instant case, in which the material witnesses will have  
2        been incarcerated 45 days on the hearing date of this motion due  
3        solely to their inability to secure bond, continued incarceration  
4        violates the clearly stated intent of the Congress and the  
5        straightforward rulings by the Court of Appeals (*Torres-Ruiz v.*  
6        *United States District Court*) that such practices shall not be  
7        permitted. Prolonged and continued incarceration clearly meets the  
8        test of "exceptional circumstances" as referenced in *Torres-Ruiz v.*  
9        *United States District Court*. In another case where the material  
10      witness had been in custody for three weeks, the Fourth Circuit  
11      held that continued incarceration with no prospective surety  
12      available to post bond was an exceptional circumstance justifying  
13      deposition and release of the material witness. (*United States v.*  
14      *Rivera*, 859 F.2d, 1204, 1205 (4<sup>th</sup> Cir. 1988))

15        The circumstances in this case are similar to *Torres-Ruiz* and  
16      *Rivera*, as the material witnesses in this case continue to be held  
17      for no purpose other than to be a witness owing solely to his  
18      inability to post bond. Because deposition serves as an adequate  
19      alternative to their continued incarceration, MING ZHOU ZHU,  
20      LIANGNENG JIANG, YUHAI WANG, XUZAI DONG and LIQIU LIN have "an  
21      overriding liberty interest in not being detained as a material  
22      witness when the deposition serves as an adequate alternative to  
23      prolonged detention." (*Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 419-420  
24      (5<sup>th</sup> Cir. 1992)). Under the standards articulated by the Court of  
25      Appeals, prolonged incarceration of MING ZHOU ZHU, LIANGNENG JIANG,  
26      YUHAI WANG, XUZAI DONG and LIQIU LIN merely because of their  
27      inability to secure bond thus is an exceptional circumstance that

1 || mandates their immediate deposition and release.

2           Exceptional circumstances also may be shown by the effect of  
3           prolonged incarceration on the family of the material witnesses.  
4           (Torres-Ruiz v. United States District for the Southern District of  
5           California) In the Torres-Ruiz case, the material witnesses were  
6           held more than 60 days and the Ninth Circuit held "the continued  
7           detention of . . . material witnesses, whose testimony could be  
8           adequately preserved by videotaped deposition and whose families  
9           are suffering extreme hardship as a result of petitioner's  
10           continued detention, is an exceptional circumstance justifying the  
11           extraordinary remedy of mandamus. . ." and ordered the district  
12           court to "schedule video depositions of petitioners at the earliest  
13           possible date."

In the instant matter, counsel acting on behalf of the detained material witnesses believes there will be no failure of justice in requiring a deposition, and asserts that such is supported by case law. It is true that the defendants have a Constitutional right to confront and cross-examine witnesses against them, but these rights must be balanced against the Constitutional rights of the detained witnesses. In this matter, the defendant is represented by counsel who has been notified of the deposition and invited to ask all questions of the witnesses which counsel believes will further his case.

III

## CONCLUSION

Under the clear meaning of U.S.C. Section 3144, legislative

1      history and relevant case law, the ordering of a deposition and  
2      subsequent release of these material witnesses is mandatory. With  
3      that in mind, the witnesses respectfully request this Court grant  
4      a video deposition of their testimony and then order their release.

5      DATED: February 26, 2008

6                    /s/ Al Smithson  
7                    AL SMITHSON, Attorney for  
8                    Material Witnesses  
9                    MING ZHOU ZHU  
10                  LIANGNENG JIANG  
11                  YUHAI WANG  
12                  XUZAI DONG  
13                  LIQIU LIN

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